



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case no: JR3050/12

In the matter between:

**SATAWU obo ROBERT NKABINDE**

**Applicant**

and

**UTI SOUTH AFRICA (PTY) LTD**

**First Respondent**

**E MAREE**

**Second Respondent**

**NATIONAL BARGAINING COUNCIL FOR THE ROAD**

**Third Respondent**

**FREIGHT AND LOGISTICS INDUSTRY**

**Heard: 14 January 2015**

**Delivered: 11 December 2015**

**Summary: Explanation for the delay in prosecuting a review application occasioned by a legal representative's lack of diligence reasonable and acceptable for condonation to be granted.**

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## JUDGMENT

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MTHOMBENI AJ

### Introduction

- [1] This is an application in terms of Rule 11 of the Rules of this Court to dismiss the review application filed by the first respondent and the arbitration award (“the award”), made by the second respondent, to be made an order of court.
- [2] The application is opposed and the first respondent seeks to apply for condonation for the late filing of its answering affidavit to this application

### Background

- [3] The applicant was employed at the first respondent on 1 July 2005 as a driver. The first respondent terminated his employment contract on 13 May 2011 for failure to inform management of his absence, following a disciplinary enquiry.
- [4] Aggrieved by his dismissal, the applicant approached the third respondent and referred a dispute claiming an unfair dismissal.
- [5] On 11 October 2012, the third respondent, after the dispute remained unresolved at the conciliation meeting, scheduled the matter for arbitration and appointed respondent to arbitrate over the dispute.
- [6] The second respondent was enjoined to determine whether the dismissal was the most appropriate sanction, considering that there was no dispute concerning the procedure followed or any of the substantive issues. The second respondent concluded in his award that the dismissal was unfair and ordered reinstatement with retrospective effect.
- [7] On 13 December 2012, the first respondent brought an application for the reviewing and setting aside of the award.

- [8] On 9 December 2013, the applicant brought an application in terms of Rule 11 for the dismissal of the review application brought by the first respondent.
- [9] The matter was set down for hearing on 29 April 2014. On that day, Molahlehi J postponed the matter and ordered the first respondent to file an application for condonation for the late filing of its answering affidavit to the application in terms of Rule 11 and an explanation for the delay in prosecuting the review application.

#### Application for condonation

- [10] The applicant submits that on 18 February 2013, 11 March 2013 and 12 August 2013, the applicant's attorneys of record addressed letters to the first respondent's attorneys of record enquiring about the record of the arbitration proceedings and underscoring the importance of such a record to ensure expeditious prosecution of the review application. In addition, the applicant's attorneys of record indicated their intention to bring this application, should the first respondent fail to ensure that the record was filed with the court.
- [11] The first respondent submits that its previous attorneys of record did not bring these letters to its attention. Subsequently, the Law Society of the Northern Provinces had for this reason, *inter alia*, made an application to the High Court for the removal of the name of the third respondent's former legal representative from the roll of attorneys.
- [12] On 16 May 2013, the first respondent's attorneys of record responded and advised that they had instructed the transcribers to transcribe the record and they would revert once they had received the record. Save this response, there was no other communication by the first respondent.
- [13] The first respondent submits that in or about September 2013 it terminated the mandate of its erstwhile attorneys of record and removed its files, owing to their negligent handling of its review application, approached its current attorneys of record and instructed them to handle the matter.

- [14] On 29 April 2014, Mr Ross Acheson (“Acheson”), an attorney at the first respondent’s current attorneys of record, while attending to another matter at this Court was alerted to the fact that the applicant had brought this application of which neither he nor the first respondent had been made aware.
- [15] Thereupon, Acheson advised the first respondent about this application. The first respondent instructed the current attorneys of record to substitute themselves for his erstwhile attorneys of record and oppose the matter.
- [16] On 30 April 2014, Ivan Pillay (“Pillay”), an attorney at the first respondent’s current attorneys of record, attended at this Court’s registrar’s office, Lubbe and Mentijies and IAfrica, the transcribers, with a view to locate the record of the arbitration proceedings. However, Pillay was unsuccessful.
- [17] On 16 May 2014, the first respondent’s current attorneys of record delivered a notice of substitution of attorneys of record.
- [18] On 5 and 8 May 2015, the first respondent’s attorneys of record addressed letters to the third respondent and its attorneys enquiring if the record of the proceedings (“the record”) had been filed with the first respondent.
- [19] On 8 May 2014, one Janine from the third respondent advised the first respondent’s attorneys of record that they had no record of the third respondent’s review application and requested to be furnished with a copy. On the same day, the third respondent’s current attorneys of record addressed a letter to the applicant attorneys of record advising them of the situation and requesting more time within which to file the answering affidavit, but there was no response.
- [20] The first respondent submits that it was under a reasonable impression that its previous attorneys of record had been diligently prosecuting the review application, was not aware that the file relating to the review application had not been handed over to its current attorneys of record and was not advised about the Rule 11 application.

[21] The first respondent submits, further, that it has reasonable prospects in the review application, for the second respondent committed a gross irregularity when he concluded that dismissal was not an appropriate sanction in circumstances where dismissal was fair in that the employee had admitted breach of the rule concerning failure to inform management of his absence for which he had been counselled before. Should condonation not be granted, the first respondent submits that it will be prejudiced in that it would not deliver its answering affidavit to the review application

[22] The Labour Appeal Court in *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC), stated, after reference to a number of cases with approval, that:

‘...in considering whether good cause has been shown in an application of this kind, the approach in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F should be adopted...The approach is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused...The courts have traditionally demonstrated their reluctance to penalise a litigant on account of conduct of his representative but have emphasised that there is a limit beyond which a litigant cannot escape the results of his representative’s lack of diligence or the insufficiency of the explanation tendered...’.

[23] In *Grootboom v National Prosecuting Authority and Another* [2014] 1 BLLR 1 (CC) at para 22, the Constitutional Court stated the standard is the interest of justice and what is in the interest of justice must reflect due regard to all the

relevant factors set out in *Melane*, but it is not necessarily limited to those factors. The particular circumstances of each case will determine which of these factors are relevant. (See also *Nehawu obo Mofokeng and Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC).

- [24] The third respondent's erstwhile attorneys of record are responsible for failure to serve and file the record from the launching of the review application up to the date when the third respondent withdrew his mandate. I am convinced that the third respondent had been under the impression that the file relating to the review application had also been handed over to its current attorneys of record and that both the respondent and their current attorneys of record had not been aware of the Rule 11 application.
- [25] It is axiomatic that there are limits to which litigants can rely on the negligence of their legal representatives; in particular where they display gross ineptitude. This notwithstanding am not convinced that the third respondent had also been negligent. In my view, therefore, the consequences of the negligence of the first respondent's former attorney of record must not be visited upon the first respondent.
- [26] I am convinced that the first respondent's current attorneys of record had, since substituting themselves as attorneys of record, diligently acquitted themselves. Moreover, they even requested the applicant for an extension of time, but there was no response.
- [27] I now turn to consider if the application for condonation has been sufficiently motivated as set out in *Melane*. The delay in delivering the answering affidavit to the Rule 11 application is not five months and one. While the delay is considerable find the explanation reasonable and acceptable. It is trite that the prospect of success cannot be debated in any detailed and meaningful manner. It suffices that the first respondent made submissions in such detail to enable the court to assess if, *prima facie*, there are prospects of success. I am, therefore, convinced that there are adequate submissions on the prospects of success that, if made successfully in the review application, the first respondent

would be entitled to relief. I am convinced that, having considered all the facts, the first respondent will be prejudiced if condonation is not granted.

#### Application to make the award an order of court

[28] It is trite that the mere fact that of a pending review is not a bar to a court making an award an order of court and the power to make an order of court is a discretionary power to be exercised judicially.

[29] In *Ntshangase v Speciality Metals CC* [1998] 3 BLLR 305 (LC) at para 13, the Labour Court stated that:

‘...To succeed in (sic) stay proceedings the applicant must satisfy the Court that there are good prospects of success in the pending matter, that the balance of convenience is in his favour and that it would be fair to stay the present proceedings’. (See also *Khoza v Sasol* [2002] 9 BLLR 868 (LC) and *Olivier v University of Venda* [2003] 5 BLLR 471 (LC)).

[30] I have found hereinbefore that the first respondent has reasonable prospects of success of the review application succeeding. For this reason, in my view, it would be unfair to deny the first respondent an opportunity of challenging the award.

[31] In my view, it is not appropriate in this case that costs should follow the result, considering that the applicant had incurred costs in bringing this application in circumstances where the first respondent was responsible for prosecuting the review application.

#### Order

[32] I, accordingly, make the following order:

32.1 The application for condonation is granted;

32.2 The application for the dismissal of the review application instituted by the first respondent under Case Number JR3050/12 is dismissed;

32.3 The application to make the arbitration award, issued by the second respondent under Case Number GPRFCBC16351, an order of court is dismissed; and

32.4 The third respondent to pay the applicant's costs.

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Mthombeni,AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: MM Baloyi, of MM Baloyi Attorneys

For the Third Respondent: KM McAdam, of Lee and McAdam Attorneys